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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DAVID A. RETA et al., Plaintiffs and Appellants, v. MONTEREY FINANCIAL SERVICES, INC., Defendant and Respondent.	B236988 (Los Angeles County Super. Ct. No. BC455962)

APPEAL from an order of the Superior Court of Los Angeles County, Mark Mooney, Judge. Affirmed.

Parisi & Havens, David C. Parisi, Suzanne Havens Beckman; Preston Law Offices and Ethan Preston for Plaintiffs and Appellants.

Call & Jensen, Matthew R. Orr, Michael S. Orr and Melinda Evans for Defendant and Respondent.

David A. Reta and Patricia Diaz filed a putative class action lawsuit against Be., LLC (Be), a company that promoted itself as providing management services for children pursuing careers in the entertainment industry, and Monterey Financial Services, Inc. (Monterey), which financed Be's advance-fee contracts with its customers. Their complaint alleged causes of action for fraud and for violations of the Advanced Fee Talent Services Act (AFTSA) (former Lab. Code, § 1701 et seq.),[1] in effect at the relevant time, and various other consumer protection statutes. The trial court denied Reta and Diaz's motion for a preliminary injunction to impose a constructive trust on all funds Monterey had collected from Be customers, to prohibit Monterey from reporting unpaid sums as bad debts to credit reporting agencies and to require it to expunge any negative reports it had previously made.[2] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Contracts with Be and the Financing Agreements with Monterey*

According to her declaration in support of the motion for preliminary injunction, in February 2008 Diaz responded to an advertisement seeking children for nonunion work with major television networks. A talent scout for Be invited Diaz and her son to attend a screen test. After a third meeting a Be employee offered to provide Diaz's son with access to auditions attended by talent agents who could secure employment for him.

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[1] AFTSA was adopted in 1999 (Stats. 1999, ch. 626, § 1) and amended several times before it was repealed effective January 1, 2010 and replaced by stricter legislation regulating disclosures and contract requirements for fee-related talent services. (Lab. Code, § 1701 et seq.; Stats. 2009, ch. 286, §§ 2, 3.)

[2] Several weeks after denying the motion for a preliminary injunction, the trial court granted Monterey's motion to compel arbitration of Reta and Diaz's claims and stayed all further court proceedings. Although the notice of appeal refers only to the order denying the motion for preliminary injunction, in their briefs in this court Reta and Diaz also attempt to argue the arbitration clauses in the financing portion of the contracts are not enforceable. An order compelling arbitration is not appealable. (*Elijahjuan v. Superior Court* (2012) 210 Cal.App.4th 15, 19; *Muao v. Grosvenor Properties, Ltd*. (2002) 99 Cal.App.4th 1085, 1088.) Such an order may be reviewed on appeal only from the judgment entered after the arbitration is completed. (*Muao*, at p. 1089.)

Diaz executed a contract with Be stating, "We are an entertainment company that offers a membership comprised of a collection of resources, discounts and a support system designed to help individuals get started on a pathway to success." The membership was valid for five years and included a list of services at "discounted" fees, such as $50 for an acting workshop, $25 each for singing, dance and modeling workshops, $25 for showcase registration and $75 for 50 duplicate photos. The cost of the membership was $3,495, with a down payment of $325 and the balance (including interest) to be paid in 12 installments of $295.17. The separate financing agreement included notice that Be had assigned the "retail installment contract" to Monterey.

In his declaration Reta stated he and his son had been approached by a Be representative while they were at a mall in September 2008. After Reta's son completed three screen tests, a Be representative made a sales presentation similar to the one Diaz had received. Reta and his wife signed a contract with Be for a two-year membership at a cost of $2,495 with a $325 down payment and the balance financed. After making several monthly payments to Monterey, Reta had the monthly payments for December 2008 through February 2009 reversed by his credit card company. Monterey sent the Retas a letter seeking to collect the unpaid balance of the contract ($1,860 plus interest). The Retas did not pay it. More than a year later, Reta obtained a copy of his credit report, which reflected the unpaid amount as a negative event. Reta testified, "On information and belief, Monterey's derogatory remarks on my credit reports have increased the cost of my current mortgage and will increase the cost of any refinancing until the remarks are removed." Additionally, Reta stated he had "experienced severe annoyance and deep frustration when attempting to remove Monterey's remark" from his credit reports.

2. *The Class Action Complaint*

On February 24, 2011 Reta and Diaz filed a 12-count complaint on behalf of themselves and a putative class consisting of all persons residing in California who had entered into a contract with Be that purported to provide a discounted fee for acting workshops or similar activities in exchange for upfront payments prior to professional

employment of the contract beneficiary.[3] The complaint asserted causes of action against Be, Monterey and Dynamic Showcases, LLC for fraud and violations of AFTSA and several other consumer protection statutes. The complaint acknowledged Be had denied in a newscast exposé of its practices that it was subject to AFTSA—claiming a client "can't meet an agent through us"; "[y]ou have to meet an agent through the showcase company we contract with." Nonetheless, Reta and Diaz alleged, Be was in fact operating an advance-fee talent service agency and its contracts violated AFTSA in part because they did not include right-to-refund and right-to-cancel provisions. The complaint further alleged, even if it were legal for Be to collect advance fees, it lacked the ability and experience to provide career management services and used emotionally manipulative sales practices to ensnare consumers.

As to Monterey, the complaint alleged Monterey had loaned a significant sum of money to Be in exchange for assignment of Be's accounts receivables. By early 2008 Monterey knew consumers had complained Be's contracts violated AFTSA, yet it continued to collect or attempt to collect on Be accounts. The claims asserted against Monterey included many of the same claims alleged against Be, as well as a cause of action for violation of the Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.) for communicating information it knew or should have known was false to rating agencies and failing to provide proper written notice to Be customers before reporting the debts.

3. *The Trial Court's Denial of the Motion for Preliminary Injunction*

In August 2011 Reta and Diaz moved for a preliminary injunction to impose a constructive trust on all money Monterey had collected pursuant to the financing contracts; to prohibit Monterey from reporting uncollected sums as delinquent to credit agencies; and to require it to expunge any delinquent reports already made. Reta and Diaz explained the United State District Court for the Northern District of California had

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[3] Two proposed subclasses included class members "who have (1) paid money to Monterey under their contract with Be; or (2) received communications from Monterey seeking to collect unpaid portions of Be Productions' fees."

already determined Be's contracts violated AFTSA and had granted a constructive trust as to money paid to Be. (*DuFour v. Be., LLC* (N.D. Cal. Dec. 7, 2009, No. 09-3770) 2009 U.S. Dist. Lexis 120563 (*DuFour*).)[4] Reta and Diaz argued, because there could be no question the Be contracts were illegal, any money collected pursuant to the financing agreements was wrongfully obtained and thus properly subject to imposition of a constructive trust, and any uncollected sums improperly reported as delinquent debts. Reta and Diaz also argued irreparable harm, a general requirement for issuance of preliminary injunctive relief, must be presumed whenever a constructive trust is an available remedy and no showing of irreparable injury is necessary under the Consumer Credit Reporting Agencies Act (CCRAA) (Civ. Code, § 17851.1 et seq.)

The trial court denied the motion for preliminary injunction after hearing argument on September 6, 2011.[5] The court expressed significant doubt about Reta and Diaz's likelihood of success on the merits, but concluded, even if they had made a minimal showing on the merits, they had failed to demonstrate irreparable harm: "[Plaintiffs]

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[4] The district court granted a preliminary injunction (constructive trust) under rule 65 of the Federal Rules of Civil Procedure as to Be, but denied it with respect to all other named defendants including Monterey. The court explained plaintiffs' evidence indicated Be was on the verge of bankruptcy and, "if Plaintiffs are forced to wait until the conclusion of the these proceedings before obtaining relief, there will be nothing left to satisfy a judgment." (*DuFour, supra*, 2009 U.S. Dist. Lexis 120563 at *3.) However, the court found plaintiffs had presented no evidence demonstrating irreparable harm as to Monterey or the other defendants. "There is no evidence that these other defendants are on similarly weak financial footing, and therefore no evidence to support the conclusion that they will be unable to satisfy a judgment at the conclusion of these proceedings. Therefore, Plaintiffs are not entitled to preliminary relief against those parties." (*Ibid.*)

[5] The court's oral order denying the motion for a preliminary injunction, made at the September 6, 2011 hearing on the motion, is reflected in its minute order entered on that date. A copy of the September 6, 2011 minute order is attached to Reta and Diaz's civil case information statement but was omitted from their Appellants' Appendix and Appellants' Reply Appendix. (See Cal. Rules of Court, rules 8.122(b)(1)(C) [clerk's transcript must contain a copy of any order appealed from and any notice of its entry]; 8.124(b)(1)(A) [an appellant's appendix must contain all items required by rule 8.122(b)(1)].)

haven't met their burden to convince me that preliminary injunction, that's extraordinary relief, that you've got to really show that you're entitled to it, and that there is going to be some immediate harm. I just don't see it here . . . ."

DISCUSSION

1. *Governing Law*

a. *Standard of review*

"As its name suggests, a *preliminary* injunction is an order that is sought by a plaintiff *prior to a full adjudication of the merits of its claim.* [Citation.] To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis* (2003) 30 Cal.4th 528, 554; see *DVD Copy Control Assn., Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 249 ["preliminary injunction is appropriate to maintain the status quo pending trial of the merits"].) "In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction." (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999.)

We generally review the trial court's ruling for abuse of discretion. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1449-1450.) An order denying an application for a preliminary injunction may be reversed only if the trial court abused its discretion with respect to *both* the question of success on the merits and the question of irreparable harm. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286-287.) However, if the "likelihood of prevailing on the merits" determination depends on construction of a statute and its application to undisputed facts, our review of that issue is independent or de novo. (*Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1274; see *California Medical Assn. v. Regents of University of California* (2000) 79 Cal.App.4th 542, 547, fn. 8 [de novo review when characterization of evidence is disputed, not evidence itself, and resolution of appeal depends on construction of relevant statutes].)

b. *AFTSA*

AFTSA was enacted in 1999 after news stories had "chronicled the exploitation of artists by people posing as talent managers who would request large deposits and promise employment that they never could secure. They would string parents along and continue to make money off them by promising careers in entertainment for their children." (Assem. Com. on Labor and Employment, Rep. on Assem. Bill No. 884 (1999-2000 Reg. Sess.) Apr. 21, 1999, p. 3 [proposed amendment].) The legislation sought to "ensure that actors breaking into the business know whether they are dealing with a reputable artist's manager." (*Ibid.*) To this end, former Labor Code section 1701.4 required advance-fee talent service contracts include rights to refund and to cancel in specific language using 10-point boldface type in close proximity to the artist's signature.[6]

2. *The Trial Court Did Not Abuse Its Discretion in Concluding Reta and Diaz Failed To Demonstrate Interim Harm Warranting a Preliminary Injunction*

a. *Imposition of a constructive trust on funds paid to Monterey*

A constructive trust is an equitable remedy to compel a person to return property that he or she does not rightfully possess. (See *Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 160; *Taylor v. Polackwich* (1983) 145 Cal.App.3d 1014, 1022 ["constructive trust is a remedial device created primarily to prevent unjust enrichment"]; see also Civ. Code, §§ 2223, 2224.) Three conditions must be satisfied for imposition of a constructive trust: "(1) the existence of a *res* (property or some interest in property); (2) the *right* of a complaining party to that res; and (3) some *wrongful* acquisition or

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[6] At the time Reta and Diaz entered into their contracts with Be, AFTSA required the contract to disclose the right to refund in the following language, "If you pay all or any portion of a fee and you fail to receive the services promised or that you were led to believe would be performed, then (name of advance-fee talent service) shall, upon your request, return the amount paid by you within 48 hours of your request for a refund. If the refund is not made within 48 hours, then (name of advance-fee talent service) shall, in addition, pay you a sum equal to the amount of the refund." (Former Lab. Code, § 1701.4, subd. (a)(4).)

Under the legislation effective July 1, 2010, advance-fee talent representation services are unlawful. (Lab. Code, § 1702.)

detention of the res by another party who is not entitled to it." (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990.) "Fraud or intentional misrepresentation is not required for a constructive trust to be imposed. [Citation.] A breach of contract or intentional interference with contract can make the offending party a constructive trustee." (*GHK Assoc. v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 878 (*GHK*).)

A court may issue a preliminary injunction imposing a constructive trust on funds pursuant to Code of Civil Procedure section 526, subdivision (a)(3),[7] if necessary to prevent the dissipation or disappearance of the proceeds or profits of a challenged transaction: "An injunction against disposing of property is proper if disposal would render the final judgment ineffectual. . . . To paraphrase Justice Cardozo, if '[a] constructive trust is the [voice] through which the conscience of equity finds expression,' then a court can surely prevent the stifling of that voice before it has a chance to be heard." (*Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119, 136, fn. omitted (*Heckmann*).)

Reta and Diaz failed to demonstrate a preliminary injunction was necessary to restrain Monterey from dissipating the funds it had obtained from Be's clients, thereby destroying the value of their equitable remedy of constructive trust.[8] Instead, fundamentally misreading this court's decisions in *Heckmann* and *GHK*, they erroneously

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[7] Code of Civil Procedure section 526, subdivision (a)(3), provides an injunction may be granted "[w]hen it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render judgment ineffectual."

[8] We accept without deciding Reta and Diaz's argument they established a likelihood of prevailing on the merits of their claims against Monterey on the ground a financing company can be held liable for the fraudulent acts of the original seller. (See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 822 ["it has long been settled in California that a financial institution may be denied the status of a holder in due course because of its close connection with the seller"]; Civ. Code, § 1804.2, subd. (a) ["assignee of seller's rights is subject to all equities and defenses of the buyer against the seller arising out of the sale . . . but the assignee's liability may not exceed the amount of the debt owing to the assignee at the time of assignment"].)

contend no showing of threatened irreparable harm is necessary for imposition of a constructive trust pendente lite. To be sure, in *Heckmann* and *GHK* we recognized a plaintiff's entitlement to a constructive trust does not depend on the lack of an adequate legal remedy. (*Heckmann*, *supra*, 168 Cal.App.3d at p. 134, fn. 8 [rejecting dictum "that because a constructive trust is an equitable remedy, the plaintiff's remedy at law must be inadequate"]; *GHK*, *supra*, 224 Cal.App.3d at p. 878.) But issuance of interim relief in *Heckmann* was expressly predicated on the need to restrain the defendants from dissipating the funds at issue in the litigation. (*Heckmann*, at p. 136 ["The purpose of the injunction in this case was not to lessen the difficulty of determining damages. [Citation.] Its purpose was to restrain [defendants] from dissipating the profit from the sale of Disney stock, and, thereby, destroying plaintiffs' equitable remedy of constructive trust."]; see also *White v. Davis*, *supra*, 30 Cal.4th at p. 554 ["'[*t*]*he ultimate goal* of any test to be used in deciding whether a preliminary injunction should issue *is to minimize the harm which an erroneous interim decision may cause*'"].)

In *Heckmann* stockholders of Walt Disney Productions filed a shareholder derivative suit against certain Disney directors and a group of former Disney stockholders, the Steinberg Group, who had threatened a corporate takeover of Disney. The stockholders alleged that, in the course of the attempted takeover, the Steinberg Group breached fiduciary duties to Disney and other Disney stockholders when it initiated and then abandoned a derivative action in federal court to obtain a premium price for the Disney shares it resold to the other defendants. (*Heckmann*, *supra*, 168 Cal.App.3d at pp. 124-125.) The stockholders obtained a preliminary injunction that effectively "impose[d] a trust on the profit from the Disney-Steinberg transaction, approximately $60 million, and require[d] the Steinberg Group to render periodic accountings of the disposition of the entire proceeds." (*Id*. at p. 123.) In upholding the order, we rejected the argument plaintiffs would not be entitled to a constructive trust even if they prevailed on the merits because they had an adequate damage remedy and thus were not entitled to the preliminary injunction imposing a constructive trust. We also held the trial court had sufficient evidence to believe dissipation of the profits was

already occurring and had reasonable concluded, absent immediate interim relief, plaintiffs' right to a constructive trust at the conclusion of the litigation would be meaningless. (*Id*. at p. 136.)

Reta and Diaz's reliance on *GHK*, *supra*, 224 Cal.App.3d 856 is even more misguided. Our decision involved review of the award of damages and imposition of a constructive trust as part of the relief granted following a bench trial. There was no preliminary injunction, and our opinion did not discuss the irreparable injury requirement for issuance of interim equitable relief.

In sum, because Reta and Diaz failed to proffer any evidence there was a risk the money collected by Monterey might dissipate or Monterey was near insolvency, the trial court correctly concluded a preliminary injunction imposing a constructive trust was not justified.

b. *Preventing the reporting of bad debts and correcting existing reports*

Civil Code section 1785.25, subdivision (a), part of the CCRA, provides, "A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." Civil Code section 1785.31, subdivision (b), permits an aggrieved consumer to obtain injunctive relief "whether or not the consumer seeks any other remedy" available.

Relying on a family law case, *In re Marriage of Van Hook* (1983) 147 Cal.App.3d 970 (*Van Hook*), Reta and Diaz contend they need not show irreparable injury or inadequacy of a remedy at law because injunctive relief is expressly authorized by statute and Monterey conceded Be's contracts violated AFTSA. The court in *Van Hook*, after analyzing the statutory basis for preliminary injunctive relief in a marital dissolution proceeding, held a trial court may enter a preliminary injunction restraining a judgment creditor of one spouse (for a debt arising post-separation) from executing on community property pending a final determination of the spouses' respective interest and division of the property. (*Id*. at pp. 977-981.) In light of this statutory scheme the court rejected the creditor's argument injunctive relief was improper because the parties' remedy at law

was adequate, holding that inadequacy of a remedy at law need not be shown to obtain injunctive relief authorized by statute where the statutory conditions for issuance are satisfied. (*Id* at p. 985.) The court also quoted in dictum language from a 1962 appellate decision holding irreparable injury need not be shown in cases involving a preliminary injunction "'where the injunction is authorized by statute, and the statutory conditions are satisfied.'" (*Ibid*.)[9]

To the extent the *Van Hook* dictum may generally suggest the moving party need not show irreparable harm before issuance of a preliminary injunction when injunctive relief is authorized by statute, as Reta and Diaz contend, "this assertion is, as a blanket statement of law, incorrect." (*Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648, 661.) To the contrary, even when an injunction is authorized by statute, "[if] the plaintiff is not a governmental entity and the statute does not expressly provide otherwise, a finding of interim harm is necessary." (*Id*. at pp. 661-662; accord, *DVD Copy Control Assn., Inc. v. Bunner, supra,* 116 Cal.App.4th at p. 250 [reversing order granting preliminary injunction because plaintiff failed to demonstrate interim, irreparable harm; although Uniform Trade Secrets Act authorizes injunctive relief, it "does not authorize an injunction in the absence of a showing of harm and [plaintiff] is not a public entity"].)

In an attempt to demonstrate the requisite interim harm, Reta and Diaz argue Reta's testimony he had experienced severe annoyance and deep frustration trying to correct his credit report was some evidence of irreparable harm, which, in the absence of any evidence Monterey would be injured if an injunction was issued, was sufficient. While Reta and Diaz are correct that "[i]rreparable harm includes '"that species of damages, *whether great or small, that ought not to be submitted to on the one hand or inflicted on the other*"'" (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 721), they again confuse the standards governing preliminary

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[9] The *Van Hook* court noted the earlier case had involved issuance of a preliminary injunction under a provision of the Agriculture Code prohibiting the sale of milk below a minimum price. (*Van Hook, supra*, 147 Cal.App.3d at p. 985, fn. 11.)

injunctions and permanent injunctions. (See *ibid.* [trial court had held plaintiff would not be entitled to permanent injunction because it had suffered no irreparable harm].)

In sum, the court, which was not convinced Reta and Diaz had demonstrated a strong probability of prevailing on the merits, did not abuse its broad discretion in concluding Reta and Diaz failed to carry their burden of demonstrating sufficient interim harm to warrant a preliminary injunction.[10] (See *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 342 [presence or absence of interrelated factors of likelihood of success on the merits and comparative harm "'is usually a matter of degree, *and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his favor*"'].) Indeed, although, like Monterey, they proffered no evidence regarding potential harm to Monterey one way or the other, it was their burden of proof, not Monterey's.

DISPOSITION

The order is affirmed. Monterey is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. SEGAL, J. *

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[10] Contrary to Reta and Diaz's contention, we do not review de novo the trial court's finding on the interim harm factor when the facts are undisputed. (See *Cohen v. Board of Supervisors*, *supra*, 40 Cal.3d at p. 289.)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.